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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1137

PAUL A. PACIERA, JR.,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN M. MAMOULIDES
District Attorney
Parish of Jefferson

ABBOTT J. REEVES, ESQ.
Director, Research and Appeals
1820 Franklin St., Suite 32
Gretna, Louisiana 70053
Phone: 504 366-9671
Attorney for Respondent

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REASONS FOR DENYING WRIT

In order to place the concept of probable cause in its proper perspective a few general considerations should be noted at the outset. Probable cause under the Fourth Amendment exists where the facts and circumstances are within the affiants knowledge, and of which he has reasonable trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 162, 45 S. Ct. 280, 288. One of the basic guidelines given by the United States Supreme Court for determining what constitutes a showing of probable cause is found in *Nathanson v. United States*,

290 U.S. 41, 54 S. Ct. 11 (1933). In *Nathanson*, a warrant was issued upon the sworn allegation that the affiant had cause to suspect and did believe that certain merchandise was in a specified location. The court noted that the affidavit stated only a mere affirmation of suspicion and belief without any statement of adequate supporting facts, and announced the following rule:

> "Under the Fourth Amendment an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefore from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough." 290 U.S. at 47, 54 S.Ct. at 13.

In *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245 (1958) the affiant swore that the defendant did receive and conceal narcotic drugs with knowledge of unlawful importation and the court stated the guiding principles to be:

> "That the inferences from the facts which lead to the complaint must be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Johnson v. United States*, 333 U.S. 10, 14, 68 S. Ct. 367, 669. The purpose of the complaint, then, is to enable the appropriate magistrate to determine whether the probable cause required to support a warrant exists. The commissioner must judge for himself the persuasiveness of the facts relied on by a com-

> plaining officer to show probable cause. We should not accept without question the complainant's mere conclusion, 357 U.S., at 486, 78 S. Ct. at 1050."

The following cases will attempt to explore the various tests this Court has used in determining whether or not a showing of probable cause has been established.

Jones v. United States, 362 U.S. 257, 80 S.Ct. 725 (1960) involved a prosecution for the violation of federal narcotic laws. The petitioner claimed the affidavit was insufficient to establish probable cause because it did not set forth the affiant's personal observations regarding the presence of narcotics in petitioner's apartment, but rested wholly on hearsay. The affiant claimed no direct knowledge of the presence of narcotics in the apartment but swore that he had been given information by an unnamed informant that the petitioner kept narcotics at his apartment and that the informant had on many occasions bought narcotics from petitioner at the location. The affiant also swore that the informant had given information on previous occasions which was correct and that the same information regarding petitioner had been given the narcotic squad by other sources of information and that petitioner was a known user of narcotics. The court upheld the validity of the warrant and stated the following:

> "* * * The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it

sets out not the affiant's observations but those of another. An Affidavit is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented.

In testing the sufficiency of probable cause for an officer's action even without warrant, we have held that he may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is *reasonably corroborated by other matters within the officer's knowledge.*

What we have ruled in the case of an officer who acts without a warrant governs our decision here. If an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hearsay, it would be incongruous to hold that such evidence presented in an affidavit is insufficient basis for a warrant. If evidence of a more judicially competent or presuasive character than would have justified an officer in acting on his own without a warrant must be presented when a warrant is sought, warrants could seldom legitimatize police conduct, and resort to them would ultimately be discouraged. Due regard for the safe-guards governing arrests and searches counsels the contrary. In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant so that the evidence in possession of the police may be weighed by an

> independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded."
>
> *We conclude therefore that hearsay may be the basis for a warrant.* (Emphasis added.) 362 U.S. at 269-271, 80 S.Ct. 755-56.

The court in *Jones* went on to note that the commissioner did not have to be actually convinced of the presence of narcotics in the apartment, but that there was a substantial basis for him to conclude that narcotics were probably present in the apartment and that was sufficient. 362 U.S. 270, 271, 80 S.Ct. 725, 736.

In *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741 (1965) the court applied the rationale of *Jones*, supra, and upheld the validity of the search warrant. In this case the defendant was convicted of possessing and operating an illegal distillery. The affidavit alleged that large amounts of sugar were taken to the defendant's house by automobile on several occasions, that five-gallon cans were also seen being taken to the house, and that federal investigators smelled the odor of fermenting mash on two occasions when they walked past the house. The affiant swore that the information was based upon his personal knowledge and from information obtained from federal investigators assigned to the case. The court made the following observation:

> "* * * While a warrant may be issued only upon a finding of probable cause, this court has long held that the term probable cause means less than evidence which would justify condemnation, and that a finding of probable cause may rest upon evidence which is not legally com-

petent in a criminal trial. 380 U.S. at 107, 85 S.Ct. 747.

— the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a *commonsense and realistic fashion*. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. *However, where these circumstances are detailed, where reason for crediting the source of this information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by in-*

> *terpreting the affidavit in a hypertechnical rather than a commonsense, manner.* Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded warrants." 380 U.S. at 108, 109, 85 S. Ct. at 746. (Emphasis added).

The court held in this case that the affidavit, if read in a commonsense way rather than technically showed sufficient facts to establish probable cause, and also noted that the affidavit was detailed and specific and set forth many of the underlying circumstances. Furthermore the U.S. Supreme Court pointed out that observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number. 380 U.S. 102, 108-112, 85 S. Ct. 741, 746-747

In *Harris v. United States*, 403 U.S. 575, 91 S. Ct. 2075 (1971) the U.S. Supreme Court looked to the totality of the circumstances in determining that there was a substantial basis for a finding of probable cause for the affidavit stated that he had a reputation for trafficking in illegal spirits; that on a prior occasion the the affidavit stated that he had had a reputation for trafficing in illegal spirits; that on a prior occasion the local police had located illicit whiskey in an abandoned house under defendant's control; that the affiant had received sworn oral information from a confidential informant, who feared for his life should his name be revealed, that he had purchased whiskey from

defendant's residence repeatedly over a period of two years; and that the informant asserted that he knew of another person who bought whiskey from defendant's house within the past two days. The Circuit Court had reversed petitioner's conviction on the grounds that the affidavit was insufficient because no information was presented to enable the magistrate to evaluate the informant's reliability or trustworthiness and therefore inadequate under *Aguilar*, and relying on *Spinelli*, determined that the remaining allegations of the affidavit failed to supply independent corroboration. The Supreme Court, however, noted that the personal and recent observations of the informant of criminal activity showed that the information had been gained in a reliable manner *which the tip failed to do in Spinelli*. The court cautioned about being hypertechnical in requiring an affidavit to show probable cause even though there was no reference to the informer's reliability.

> "* * * While a bare statement by an affiant that he believed the informant to be truthful would not, in itself, provide a factual basis for creating the report of an unnamed informant, we conclude that the affidavit in the present case contains an ample factual basis for believing the informant which, when coupled with affiant's own knowledge of the respondent's background, afforded a basis upon which a magistrate could reasonably issue a warrant." 403 U.S. at 579-580, 91 S. Ct. 2080.

The court then distinguished the case at hand and *Jones* from *Spinelli:*

> "* * * *Aguilar* cannot be read as questioning the 'substantial basis' approach of *Jones*. And unless *Jones* has somehow, without acknowledgment, been overruled by *Spinelli*, there would be no basis whatever for a holding that the affidavit in the present case is wanting. The affidavit in the present case, like that in *Jones*, contained a substantial basis for crediting the hearsay. Both affidavits purport to relate the personal observation of the informant — a factor that clearly distinguishes *Spinelli*, in which the affidavit failed to explain how the informant came by his information. Both recite prior events within the affiant's own knowledge — the needle marks in *Jones* and Constable Johnson's prior seizure in the present case — indicating that the defendant had previously trafficked in contraband. These prior events again distinguish *Spinelli*, in which no facts were supplied to support the assertion that Spinelli was 'known * * * as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.' " 403 U.S. at 581, 91 S.Ct. at 2081

The court also held that reputation, while standing alone was insufficient to establish probable cause, *Nathanson v. United States*, 290 U.S. 41, 54 S. Ct. 11 (1933), but was not irrelevant when supported by other information. Furthermore, the court observed that it is a practical consideration upon which a magistrate may properly rely in assessing the reliability of an informant's tip.

> "* * * To the extent that *Spinelli* prohibited the use of such prohibitive information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation." 403 U.S. at 583, 91 S. Ct. 2082.

The court also held that there was another reason for crediting the informant's tip in that the affidavit recited the extrajudicial statements of a declarant who, not only feared for his life, but also admitted his commission of a crime which carried its own indicia of credibility.

Article 162 of the Louisiana Code of Criminal Procedure provides that a search warrant be issued only upon probable cause established to the satisfaction of the judge by the affidavit of a credible person reciting facts establishing cause for the issuance of the warrants. The proof required to establish probable cause for issuance of a warrant is less than the amount of evidence which would justify condemnation. *Loche v. U.S.*, 7 Cranch 339, 3 L. Ed. 364.

The Supreme Court of the United States in considering the question of probable cause for the issuance of a search warrant has held the basis for such probable cause may rest upon evidence which is not legally competent in a criminal trial. *Draper v. United States*, 358 U.S. 307. In *Brinegar v. U. S.*, 338 U.S. 160, 176, 93 L. Ed. 1879, 1890, 69 S. Ct. 1302 (1949), the court held that "there is a large difference between the two things to be proved — guilt and probable cause — as well as between the tribunals which determine them and therefore a like difference in the quanta and modes of the proof required to establish them."

Thus, hearsay may be the basis for issuance of a warrant so long as there is a substantial basis for accrediting of the hearsay. *Jones v. United States*, 362 U.S. 257, and in *Aguilar* we recognize that an affidavit may be based on hearsay information that need not reflect the direct personal observations of the affiant so long as the magistrate is informed of some of the underlying circumstances supporting the affiants conclusions and his belief that any informant involved whose identity need not be disclosed was credible or his information reliable.

The court in *Ventresca*, supra, stated that affidavits of search warrants such as the ones involved here must be tested and interpreted by the magistrate in the courts in a commonsense and realistic fashion. They are normally drafted by non-lawyers in the midst of the haste of a criminal investigation. Technical requirements of elaborate specificity once enacted under a common law "pleading" have no proper place in this area.

In *Berger v. New York*, 338 U.S. 41, the Supreme Court held that probable cause under the Fourth Amendment exists when the facts and circumstances within the affiant's knowledge and of which he has reasonable cause to believe that an offense has been, or is being committed.

Petitioner relies mainly on the cases of *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509 and *Spinelli v. U.S.*, 393 U.S. 410, 89 S. Ct. 584. Because Fourth Amendment cases of reasonableness or probable cause necessarily rest on the facts and circumstances of each case

the State contends that the facts of the case at bar take the instant case beyond the rule of *Aguilar* and *Spinelli*.

In *Aguilar*, the search warrant stated only that they "have received reliable information from a credible person." In the instant case, the affiant stated in the affidavit that the "informant they received their information from has been successful in the clearing up on about 15 residence burglaries in the Algiers area. Nine of the fifteen were with convictions and four of the other charges are pending in the court." Thus, in the instant case, the affiant has laid grounds upon which the reliability and credibility of the information is based.

Also, the totality of the circumstances upon which the officer relied is certainly pertinent to the validity of the warrant. Hence, the affidavit here is a far cry from "mere suspicion" of "affirmance of belief", and not only because it was based on a reliable informer, but also on *personal surveillance by the affiant himself*. THE COURT IN *AGUILAR* WAS CAREFUL TO POINT OUT THAT ADDITIONAL INFORMATION OF THE KIND PRESENTED IN THE AFFIDAVIT IN THE INSTANT CASE WOULD BE HIGHLY RELEVANT: "IF THE FACT AND RESULTS OF SUCH A SURVEILLANCE HAD BEEN APPROPRIATELY PRESENTED TO THE MAGISTRATE, THIS WOULD OF COURSE, PRESENT AN ENTIRELY DIFFERENT CASE." 278, U.S. at 109, N.1., 12 L.Ed. 2d at 725. See *U. S. v. Eisner*, 297 F. 2d 595, Sup Ct. denied cert. 82 S. Ct. 947, *Evans v. U. S.*, 242 F. 2d 534, S. Ct. denied cert. 77 S. Ct. 1059,

U. S. v. Ramirez, 279 F. 2d 712, 715, *U. S. v. Meeks*, 313 F. 2d 464.

This Court denied certiorari in *Eisner*, although the affidavit there stated only that "information has been obtained by S. A. Clifford Anderson . . . which he believes to be reliable . . . , 297 F. 2d at 596 and in *Evans*, where the affiant was a man who "came to the headquarters of the federal liquor law enforcement officers and stated that he wished to give information . . . ," 242 F. 2d at 535.

In *Carroll v. U. S.*, 267 U.S. 132, 162, 69 L.Ed. 543, 556, 45 S. Ct. 280 (1925) the court found that probable cause exists where "the facts and circumstances within their (the officers) knowledge and of which they had reasonable trustworthy information (are) . . . sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

In *Brinegar v. U. S.*, 338 U.S. 160, 176, 93 L.Ed. 1879, 1890, 69 S. Ct. 1302 (1949) Mr. Justice Rutledge stated that "these long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusion of probability. THE RULE OF PROBABLE CAUSE IS A PRACTICAL

NON-TECHNICAL CONCEPTION AFFORDING THE BEST COMPROMISE THAT HAS BEEN FOUND FOR ACCOMMODATING THESE OFTEN OPPOSING INTERESTS, requiring more would unduly hamper law-enforcement." As Justice Clark states in his dissenting opinion in *Aguilar*, "there is no rigid academic formula for the unrigid standards of reasonable and probable cause laid down by the Fourth Amendment. This would lead to an obstruction of the administration of criminal justice."

The court in *Spinelli, supra*, stated that in the absence of a statement detailing the manner in which the information was gathered by the informant, it is especially important that the tip be described so that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

> The Court should look to the totality of the circumstances in determining that there was a substantial basis for a finding of probable cause for issuance of the warrant.

In the instant case, the informer stated to the officers "THAT PAUL PACIERA IS A FENCE MAN FOR STOLEN PROPERTY AND THAT MANY OF THE KNOWN BURGLARS OFTEN BRING STOLEN PROPERTY TO PACIERA TO MAKE THEIR MONEY FOR BUYING NARCOTICS." In addition to this, the officers, including the affiant, effected a stake out of the premises at 1042 West Mary Poppins Drive, Harvey, Louisiana and personally observed Edward Johnson, N/M 22 who is a known burglar to the affiant

from New Orleans, Louisiana, going to the residence. Thus, the facts on the affidavit clearly offer something much more substantial than a "casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

Appellant contends that the affidavit was defective because the informant spoke to a New Orleans Police Officer who in turn spoke to the affiant. *In U. S. v. Melancon*, 462 F. 2d 82 (5th Cir. 1972) U.S. cert. denied, 409 U.S. 1038, the court held that THERE WAS NO REASON TO DISCREDIT INFORMATION PASSED FROM ONE LAW ENFORCEMENT OFFICIAL TO ANOTHER BEFORE BEING OFFERED TO A MAGISTRATE AS GROUNDS FOR PROBABLE CAUSE. And in *U. S. v. Smith*, 462 F. 2d 456 (8th Cir. 1972), the court held that a magistrate need not categorically reject hearsay upon hearsay in an affidavit for search warrant, but INSTEAD HE SHOULD EVALUATE THIS INFORMATION AS WELL AS *ALL OTHER* INFORMATION IN THE AFFIDAVIT IN ORDER TO DETERMINE WHETHER IT CAN BE REASONABLY INFERRED THAT THE INFORMANT HAD GAINED HIS INFORMATION IN A RELIABLE WAY. (In this latter case the issue was informant to informant to informant whereas in the present case the issue is informant to police officer to fellow police officer — affiant). The *Smith* case has been followed on this point by *United States v. Kleve*, 465 F. 2d 187 (8th Cir. 1972) and *United States v. McCoy*, 478 F. 2d 176 (10th Cir. 1973).

In *U. S. v. Ventresca*, 380 U.S. 102, 108, 132 L. Ed 2d 684, 688, 85 S. Ct. 741 (1965) the court held that "if the teachings of the court cases are to be followed and the

constitutional policy served, affidavits for search warrants ... must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion ... Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." (Emphasis added.)

Moreover, if the courts become increasingly technical and rigid in their demands upon police officers, they may make it increasingly easy for criminals to operate, detected but go unpunished. Thus, a significant movement of the law beyond its present state would be unwarranted, unneeded, and dangerous to law enforcement efficiency.

Therefore, the State contends the affidavit in support of the issuance of the search warrant was valid and all evidence seized thereunder admissible.

CONCLUSION

The law as stated above and the facts as indicated above lead to the conclusion that the petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN M. MAMOULIDES
DISTRICT ATTORNEY
PARISH OF JEFFERSON

ABBOTT J. REEVES, ESQ.,
DIRECTOR
RESEARCH AND APPEALS
DIVISION
PARISH OF JEFFERSON
1820 Franklin St.
Suite 32
Gretna, Louisiana 70053
Phone: 504-366-9671

CERTIFICATE OF SERVICE

I, ABBOTT J. REEVES, ESQ., a member of the Bar of the Supreme Court of the United States, hereby certify that three true copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served on Petitioner by mailing copies thereof in duly addressed envelopes to Lawrence J. Genin of Chauppette, Genin, Mendoza and Parent, 4899 Westbank Expressway, Marrero, Louisiana 70072, this ____ day of March, 1976.

ABBOTT J. REEVES, ESQ.